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THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JUNE 21, 00
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Precise Imports Corporation**

Serial No. 74/461,397

Herbert F. Schwartz, Susan Progoff, Susan Loring Crane and Joseph A. Cilluffo of **Fish & Neave** for **Precise Imports Corporation**.

Amos T. Mathews, Trademark Examining Attorney, Law Office 108
(**David E. Shallant**, Managing Attorney).

Before **Hohein, Chapman** and **Rogers**, Administrative Trademark
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

An application has been filed by **Precise Imports Corporation**, d/b/a Precise International, to register the mark
"SWISS MILITARY" for "watches".¹

Registration has been finally refused on the ground
that applicant's mark consists of or comprises matter which may

¹ Ser. No. 74/461,397, filed on November 10, 1993, which alleges dates of first use of 1990. Registration is sought under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), on the basis of a claim of acquired distinctiveness as the result of five years of substantially exclusive and continuous use of the mark in commerce. Such a claim, which the Examining Attorney has accepted, was submitted in order to overcome a refusal on the ground that applicant's mark is merely descriptive of its goods within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

falsely suggest a connection with the institution of the Swiss military in violation of Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a). Registration also has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the basis that applicant's mark, when applied to its goods, so resembles the mark "SWISS ARMY," which is registered for "watches,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed and an oral hearing was held. We affirm the refusals to register.

Turning first to the refusal under Section 2(a), the Board, in *In re Cotter & Co.*, 228 USPQ 202, 204 (TTAB 1985), delineated the following as the standard which an Examining Attorney must meet in order to support a refusal on the basis that a mark "falsely suggests a connection" within the meaning of Section 2(a):

[I]t is the Examining Attorney's burden to show that the mark sought to be registered is unmistakably associated with a particular "persona." In order to do this, an Examining Attorney must show that the mark sought to be registered is the same or a close approximation of the name or identity of a person, living or dead, or of an institution and that it would be recognized as such. It must also be clear that the person or institution identified by the mark is not connected with the goods or services performed by [the] applicant under the mark. Finally, it must be shown that the fame or reputation of the named person or institution is of such a nature that a connection with such person or institution would be presumed

² Reg. No. 1,734,665, issued on November 24, 1992, which sets forth dates of first use of June 1987; affidavit §8 accepted.

when the applicant's mark is used on its goods or services.

Such test has been repeatedly applied by the Board and remains the standard for determining whether a mark falsely suggests a connection with a person or institution. See, e.g., In re Wielinski, 49 USPQ2d 1754, 1757 (TTAB 1998); In re Sloppy Joe's International Inc., 43 USPQ2d 1350, 1353 (TTAB 1997); In re North American Free Trade Association, 43 USPQ2d 1282, 1284 (TTAB 1997); In re Kayser-Roth Corp. 29 USPQ2d 1379, 1384-85 (TTAB 1993); and In re Nuclear Research Corp., 16 USPQ2d 1316, 1317 (TTAB 1990).

Applicant, relying principally upon a February 20, 1998 declaration of its president, Thomas E. Higgins, in support of its contention that its mark is registrable, insists that: "The Examining Attorney cannot demonstrate that appellant's mark is unmistakably associated with the Swiss military, because, quite simply, no institution named the 'Swiss military' exists." In particular, we note that Mr. Higgins avers that:

6. During my years of working in the watch business on Precise's behalf, I have had numerous discussions with watch manufacturers, retailers, distributors, consumers and our competitors in the watch business. Based on this experience, I believe that consumers and the trade recognize the trademark SWISS MILITARY as a brand of watches sold by Precise. Similarly, in my experience in the watch business, no one has ever asked me whether SWISS MILITARY watches are associated with the Swiss Defense Department or any branch of the Swiss armed forces or Swiss government. Consequently, I do not believe that the SWISS MILITARY trademark is understood by the public or the trade as meaning watches of the same type as are used by the Swiss armed forces or watches

that are associated in some way with the Swiss armed forces. Moreover, there is no organization having the name Swiss Military; there is only a Swiss Defense Department, Swiss Army, Swiss Air Force and Swiss Navy.

Applicant also maintains that none of the excerpts made of record from the "NEXIS" electronic database "support[s] the proposition that a unitary institution, the 'Swiss military,' exists" or that "there is a unitary institution known as the 'Swiss military.'" Moreover, according to applicant:

"The military" is, at most, an ephemeral, catchall description, a shorthand generalization used to refer to the armed forces as a whole for matters of convenience. People use the word ... as this catchall phrase because it is easier than saying "the army, navy, air force, and marines," not because an identifiable, unitary institution called "the military" actually exists.

Applicant additionally argues that, even if the "NEXIS" excerpts "demonstrate the existence of an institution known as the 'Swiss Military,' a Section 2(a) refusal is appropriate only if there is just one entity with which the proposed mark is associated."³ Here, applicant contends, "the term 'Swiss Military' does not uniquely identify any one branch of the Swiss

³ Applicant further asserts that, as shown by the record, "the Patent and Trademark Office has recognized that marks that are identical to the names of actual branches of the Swiss armed forces are registrable under Section 2(a)," such as a registration for the mark "SWISS NAVY" for military type shirts and registration for the mark "SWISS ARMY" for sunglasses as well as watches. It should be pointed out, however, that while consistency of examination is desirable, each case must ultimately be decided on its merits. *See, e.g., In re Pennzoil Products Co.*, 20 USPQ 1753, 1758 (TTAB 1992). The existence, therefore, of a few third-party registrations, including the cited Section 2(d) reference, simply is not dispositive as to Patent and Trademark Office practice with respect to registrability of the same or similar marks. *See, e.g., In re Quik-Print Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980) at n. 8; and *In re Inter-State Oil Co., Inc.*, 219 USPQ 1229, 1230-31 (TTAB 1983).

government" nor in any event could that term "uniquely point to an institution because any such use by the Swiss government would be a generic use of 'Swiss military'" to "describe the Swiss armed forces".⁴ Applicant also asserts that the Examining Attorney "has not presented any evidence suggesting that even a single consumer would presume, upon viewing appellant's SWISS MILITARY watches, that the (non-existent) 'Swiss military' is connected to those watches."⁵

While we concur with applicant that the "NEXIS" excerpts relied upon by the Examining Attorney are generally of limited probative value insofar as establishing what significance the term "SWISS MILITARY" would have to consumers in the United States,⁶ we nevertheless agree with the Examining Attorney that,

⁴ Although applicant maintains, as evidenced by the declaration of its associate counsel, Susan Loring Crane, and an exhibit thereto, that "the fact that appellant has registered SWISS MILITARY for watches in Switzerland itself, without complaint from the Swiss government," is "[p]erhaps most persuasive" of its entitlement to registration of its mark here, there has been no showing that, under Swiss law, the government of Switzerland would be permitted to object to or otherwise preclude the issuance of such a registration to applicant nor does such inactivity constitute a formal consent to registration here.

⁵ In fact, applicant urges, based upon six form declarations from "experts with a combined 93 years of experience in the retail watch field," that "consumers associate SWISS MILITARY with appellant and its watches, not with the Swiss government," and that the Examining Attorney, by accepting applicant's claim of acquired distinctiveness under Section 2(f), "has recognized that consumers associate SWISS MILITARY on watches with appellant". The fact, however, that the Examining Attorney accepted such claim for the purpose, as previously noted, of overcoming the refusal on the basis of mere descriptiveness does not mean that the refusal on the ground of falsely suggesting a connection with an institution can be traversed in such a manner since a refusal under Section 2(a) is a bar which is not subject to being overcome by resort to the provisions of Section 2(f).

⁶ We primarily reach such conclusion due to the fact that many of the articles excerpted appear to be from foreign periodicals and wire services. Because there is no evidence either that such sources, in the case of foreign publications, have a significant circulation among

as used in connection with watches, such term would be unmistakably associated with the armed forces or military services of Switzerland. In particular, we find first of all that, in light of various dictionary definitions and the demonstrated manner in which applicant markets its goods, the term "SWISS MILITARY" constitutes--and would be recognized as--the name or identity of an institution of the Swiss government, specifically, the Swiss military. We judicially notice,⁷ for example, that Webster's Third New International Dictionary (1993) lists the term "military" in relevant part as a noun meaning "**1** ARMED FORCES : military branches of government ... <different branches of the ~> ...," while The American Heritage Dictionary (1992) likewise defines such term as signifying "**1** Armed forces" and The Random House Dictionary of the English Language (2d ed. 1987) defines it as "**7. the military, a.** the military establishment of a nation; the armed forces."

the general consuming public in the United States or, in the case of wire service articles, that the stories therein have been printed in publications of general circulation, it cannot be assumed that the articles excerpted therefrom have had any material impact on consumer perception as to the meaning in the United States of the term "SWISS MILITARY". See, e.g., *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1555 (TTAB 1987) at n. 6; *In re Men's Int'l Professional Tennis Council*, 1 USPQ2d 1917, 1918-19 (TTAB 1986); and *In re Bel Paese Sales Co.*, 1 USPQ2d 1233, 1235 (TTAB 1986).

⁷ It is well settled that judicial notice may be taken of dictionary definitions. See, e.g., *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953).

Thus, and although there may be no institution, as attested to in the February 20, 1998 declaration of applicant's president, which is formally or officially named the "Swiss Military," the average customer for watches would undoubtedly understand the term "SWISS MILITARY," in view of the foregoing definitions, as collectively denoting the armed forces of Switzerland. The record, moreover, fails to show that such term has any other plausible or well-known meaning. This case, therefore, is unlike the situation in *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505, 509 (Fed. Cir. 1983), in which the term "NOTRE DAME" was associated not only with a university, but also identified a famous and sacred religious figure and was used in the names of churches dedicated to Notre Dame, such as the Cathedral of Notre Dame in Paris, France. It thus could not be said that the only "person" or "institution" which the name "NOTRE DAME" possibly identified was the university and that the mere use thereof by another for cheese appropriated the university's identity. Here, and notwithstanding the beliefs stated by Mr. Higgins and others in the retail watch industry that--for reasons which have not been satisfactorily explained--persons familiar with watches recognize the term "SWISS MILITARY" as a brand of watches sold by applicant and do not regard such term as associated with the Swiss armed forces or government,⁸ the connotation projected

⁸ Each of the declarants other than applicant's president claims to be "very knowledgeable about the retail watch industry as a result of having worked many years in the industry" and, among other things, avers in conclusory fashion that:

thereby is solely that of the institution consisting of the Swiss armed forces, which is uniquely known as the "Swiss military."

The fact, furthermore, that the term "SWISS MILITARY" does not specify a particular branch of the Swiss armed forces or defense establishment, such as the Swiss Army, Swiss Air Force, Swiss Navy or Swiss Defense Department, does not mean that it is ephemeral or otherwise too amorphous to particularize or be the name of a Swiss government institution. The term "SWISS MILITARY" refers precisely to the armed forces of Switzerland and no more specificity is necessary. Moreover, such term, contrary to applicant's contention, is not generic; rather, it is a proper noun, in that it names a particular nation's (Switzerland's) military establishment, and is not a common noun, which by contrast would designate a type of military institution. Applicant's reliance on the case of National Aeronautics and Space Administration v. Bully Hill Vineyards, 3 USPQ2d 1671, 1676 (TTAB 1987), which among other things held that the term "SPACE SHUTTLE" for wine does not falsely suggest a connection with NASA because such term, being generic for space transportation and related activities performed by NASA, cannot point uniquely and unmistakably to any one entity, is consequently misplaced.

4. Based upon my experience, I believe that persons familiar with retail watches associate the mark SWISS MILITARY with Wenger watches manufactured and sold by Precise International.

5. Based on my experience, consumers do not associate the SWISS MILITARY with the Swiss government. Rather, consumers have come to associate the mark SWISS MILITARY with Wenger watches manufactured and sold by Precise International.

Additionally, the record plainly shows that, not only is there a style or type of watch which is known as a military watch, but that applicant, as the Examining Attorney has pointed out, promotes its watches of that kind as being "genuine" and "standard issue," thereby leading consumers to believe that its "SWISS MILITARY" goods are associated in some fashion with the Swiss military. In particular, there are numerous excerpts, of which the following are representative, from articles retrieved by the Examining Attorney from a search of the "NEXIS" database which refer to a "military watch" (**emphasis added**):

"Other watch companies courting the women's watch business included Blancpain, with a new retro **military watch** called Fly Back, introduced for men and women" -- WWD, April 29, 1996;

"There are large-faced Russian mechanical **military watches**" -- Hartford Courant, June 21, 1995;

"[']Who is she?' a bewildered vendor at the GUM department store asked when photographers repeatedly snapped Campbell buying some **military watches** in a souvenir-hunting quest." -- Austin American-Statesman, April 24, 1995; and

"In low dosages, tritium is not considered harmful to people. It was used to make green, luminescent dials for **military watch** faces" -- Providence Journal-Bulletin, February 7, 1995.

Moreover, applicant's advertising literature for its watches, as the Examining Attorney accurately observes, highlights various features, such as tritium hands and numerals for nighttime vision, water resistance and rugged, all-weather bands, which

suggest that the goods are suitable for Swiss military or other armed forces use in addition to general outdoor or sports use.

Applicant also fosters a belief among consumers that its watches are indeed associated with the Swiss military by often marketing its watches in conjunction with its Swiss Army knives. The face of applicant's "SWISS MILITARY" watches, like the body of its Swiss Army knives, prominently features a white-cross-on-a-red-field symbol (shown at left below), which we note bears a striking resemblance to the white-cross-on-a-red-field flag of Switzerland⁹ (reproduced at right below):

When used in such context, the term "SWISS MILITARY" clearly would name, or signify the identity of, only the Swiss armed forces or military and, hence, it would be recognized by consumers solely as such. See, e.g., In re Juleigh Jeans Sportswear Inc., 24 USPQ2d 1694, 1698 (TTAB 1992) [when stylized "LONDON LONDON" mark is used for clothing in the context of hangtags featuring a representation of a London policeman, in the recognizable uniform of a bobby, and depicting the monetary symbol for the English pound, "there simply is no doubt that the public would associate applicant's clothing with London, England and would regard the ... manner in which applicant's mark

⁹ Random House Dictionary of the English Language, *supra*, "ATLAS OF THE WORLD" at 31.

displays the terms 'LONDON' as evocative of the latest in the contemporary fashion designs for which London is well known"].

As to the requirement, for purposes of establishing that a mark falsely suggests a connection with a person or institution, that the person or institution identified by the mark is not connected with an applicant's goods or services, the record is clear that, while applicant's goods are Swiss made¹⁰ and Switzerland is known for its watches and other horological instruments,¹¹ it is clear from the record that applicant's watches are not authorized by or otherwise officially connected with the Swiss military. Applicant, in fact, has stated in its initial response to the Section 2(a) refusal that its watches primarily "are not intended for sale to or use by the Swiss military". Thus, another prong of the test for whether a mark falsely suggests a connection with an institution has been met.

Finally, with respect to the remaining element required for a valid refusal under Section 2(a), we agree with the Examining Attorney that applicant's watches, including military watches, are goods of the type and character which customers would associate with the Swiss military. This is because, as the Examining Attorney persuasively argues:

[T]he success of any military operation depends in part on precision and timing. An accurate timepiece is essential in any military operations [sic] whether on land,

¹⁰ Applicant's president attests in an October 19, 1994 declaration that: "Applicant's watches are made in Switzerland."

¹¹ For example, the excerpt of record from Webster's New Geographical Dictionary (1988) sets forth "watches and clocks" as being among the "[c]hief products" included under the listing for "Switzerland".

sea or air. Because of such requirement, military watches have become known for accuracy and ability to illuminate during darkness.

Purchasers and potential customers for watches, especially those interested in military watches, would therefore be misled by applicant's use of the term "SWISS MILITARY" into falsely presuming a connection, in the sense of sponsorship, approval, support, authenticity or the like, between applicant's watches and the institution of the Swiss military. While perhaps, unlike the armed services of Great Britain or France, the Swiss military may not necessarily be famous or well known in the United States, its reputation, as shown by the record, is sufficient that consumers would know what the Swiss military is and associate applicant's "SWISS MILITARY" watches with the Swiss military. Moreover, and in any event, the inherent meaning of the term "SWISS MILITARY" is such that consumers would know precisely that the term refers to the armed forces of Switzerland and, because the term unmistakably points to the recognizable institution of the Swiss military and no other "persona," consumers would falsely assume, in light of the nature of applicant's goods, that its watches are in some manner endorsed by or connected with the Swiss military.

Turning to the refusal under Section 2(d), we agree with the Examining Attorney that, upon application of the relevant factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), confusion is likely from the contemporaneous use of the marks "SWISS MILITARY"

and "SWISS ARMY" in connection with "watches". In particular, not only are the respective goods--as set forth in the application and cited registration--identical, but the respective marks--when considered in their entireties--are substantially similar in sound, appearance and, especially, connotation. As to the latter, the record contains a definition of the word "army" from the Random House Unabridged Dictionary (2d ed. 1993), which lists such term in pertinent part as a noun meaning "1 the military forces of a nation, exclusive of the navy and in some countries the air force." We also judicially notice that, likewise, Webster's Third New International Dictionary (1993) defines such word in relevant part as a noun connoting "1 ... c often cap : the complete military organization of a nation for land warfare <the ~ of the U.S.>," while The American Heritage Dictionary (1992) sets forth the word "army" as signifying "1 ... b. Often **Army**. The entire military land forces of a country."

In view thereof, and in light of the previously noted definitions of the word "military" as meaning a nation's armed forces or military establishment, including the branches thereof, it is readily apparent that the marks "SWISS MILITARY" and "SWISS ARMY" are not only substantially similar in connotation, but overall engender substantially the same commercial impression, particularly since the Swiss Army is a branch of the Swiss military. Applicant, in fact, concedes in its April 9, 1997 request for reconsideration that its "SWISS MILITARY" mark is "conceptually similar" to registrant's "SWISS ARMY" mark.

Consumers encountering such marks in connection with watches would thus be likely to believe that the goods of applicant and registrant emanate from or are sponsored by the same source.

A trade journal article, submitted by applicant as part of Exhibit 1 to Mr. Higgins' February 20, 1998 declaration,¹² supports the conclusion that contemporaneous marketing of watches under the marks "SWISS MILITARY" and "SWISS ARMY" is rife with prospects for confusion to occur as to the origin or affiliation of such goods. Specifically, a story appearing in American Time, entitled "PRECISELY WHO IS PRECISE INTERNATIONAL?," tellingly recounts that:

IS EVERYTHING PERFECTLY CLEAR?

Precise International and Swiss Army Brands Inc. ... (the firm changed its name from the Forschner Group last year) are arch rivals.

Both distribute Swiss Army knives and Swiss-Army related watches. Both have the right to use the Swiss Army name on certain products. Consequently, it's easy to be confused about who distributes what. To distinguish between the two firms, you have to, well, be precise.

The confusion stems from the fact that there are two official manufacturers of knives for the Swiss army: Victorinox and Wenger. Both have been supplying knives to the Army since the 1890s.

Precise distributes Wenger Swiss Army knives. Swiss Army Brands distributes Victorinox Swiss Army knives. The way to tell the difference is that Wenger is the Genuine Swiss Army knife while Victorinox is the Original Swiss Army knife. (I am not making this up. Switzerland's great Compromise of 1908 gave Wenger the right to

¹² According to applicant's president, such exhibit, which consists of "[a] collection of publicity that appeared in 1997 regarding SWISS MILITARY WATCHES," evidences that "SWISS MILITARY watches have been the subject of extensive unpaid publicity." (Higgins February 20, 1998 Declaration, ¶15.)

use the word "genuine" in its marketing; the right to use the word "original" went to Victorinox.)

It's even more confusing with watches: Precise distributes watches bearing the name and famous white-cross-on-red-field symbol of the Swiss Army knives they distribute. But if Precise--or you--call them Swiss Army watches, that impression will land you in a nasty lawsuit with Swiss Army Brands. That's because Swiss Army Brands distributes watches called Swiss Army Watches. It was smart enough to register the name "Swiss Army" for watches, even though it has no connection whatsoever to the actual Swiss Army. So Precise calls its watches Swiss Military watches, not Swiss Army watches. You, of course, see the difference.

Precise also distributes Switzerland's Revue Thommen brand, which, mercifully, has nothing to do with the Swiss military. (Except that it does happen to be the official timer of a famed long-distance Alpine ski race invented and organized by the, forgive the expression, Swiss Army.)

You don't need an advanced degree in corporate law or linguistics to understand all this. But it helps.

Applicant counters, however, by arguing that registrant has consented to applicant's use of the "SWISS MILITARY" mark for watches and that, in view of such decisions as *In re Four Seasons Hotels Ltd.*, 987 F.2d 1565, 26 USPQ2d 1071, 1072 (Fed. Cir. 1993) and *Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*, 842 F.2d 1270, 6 USPQ2d 1305, 1307 (Fed. Cir. 1988), registrant's consent should be treated as being dispositive of a finding of no likelihood of confusion. Specifically, applicant maintains that, as attested to, in pertinent part, in the April 19, 1994 declaration of applicant's president:

2. ... Swiss Army Brands, Ltd., the owner of Registration No. 1,734,665 of the mark SWISS ARMY for watches, is a division of The Forschner Group, Inc. ("Forschner").

3. In 1989 representatives of applicant and Forschner met to discuss the use by applicant and Forschner of SWISS MILITARY and SWISS ARMY, respectively, for watches. The results of that meeting were memorialized in a letter from James W. Kennedy, President of Forschner, to John C. Bergeron, then Chief Executive Officer of applicant. A copy of that letter ... is attached hereto as Exhibit 2.

4. Applicant has been using SWISS MILITARY as a trademark for watches since at least as early as 1990 until the present. During that time, applicant has been made aware of no instances of actual confusion between its mark and SWISS ARMY. Nor has applicant received any protest or complaint from Forschner or Swiss Army Brands, Ltd.

Exhibit 2, referred to above, is dated August 29, 1989

and provides as follows (**emphasis added**):

Both Ron ... and I would like to thank you for visiting with us last Thursday ... and appreciate the frank and open discussion we had regarding the Swiss Army Watch.

The line of watches under the brand "Swiss Army" which we introduced and sold to the trade earlier this year will have its introductory rollout this Fall. We also understand that you plan to offer a watch sourced from ... Switzerland to your customers.

We appreciate your understanding of the issues on the term "Swiss Army Watch". **We understand that you will use the term "Swiss Military Watch" rather than "Swiss Army Watch" to describe your product** ... on the watch itself, [its] packaging, as well as any accompanying literature or catalogs. We do understand, however, that your new catalog features this watch with the words "Swiss Army" on the watch face, although the words "Swiss Military Watch" are used in the copy to describe this product. Future catalogs will feature a watch face with the term "Swiss Military Watch".

Again, thank you very much for taking the time to discuss this matter in such great

detail. **I am certain that this solution will work to the benefit of both of us.**

Applicant additionally points to the facts disclosed in the April 8, 1997 declaration from its vice president and chief financial officer, Kenneth C. Johnson, which among other things states that applicant has continuously used its "SWISS MILITARY" mark in connection with the advertising, distribution and offering for sale of watches since at least as early as October of 1989; that since that time, applicant has sold almost three million "SWISS MILITARY" watches, deriving between \$120 million to \$130 million in revenue therefrom; and that since 1989 applicant has expended more than ten million dollars in advertising and promoting its "SWISS MILITARY" watches, including between two million dollars and three million dollars expended on cooperative advertising with the retailers of its goods. The February 20, 1998 declaration from applicant's president, besides noting that the foregoing sales figures represent wholesale values and that such goods sold at retail for between \$280 million to \$300 million, further indicates that in 1997, applicant sold in excess of 700,000 of its "SWISS MILITARY" watches in the United States, representing \$34 million in revenue to applicant and a retail value of approximately \$75 million, with applicant's advertising and promotional expenditures for such goods totaling nearly two and a half million dollars. These amounts, applicant maintains, demonstrate that confusion as to source or origin with respondent's "SWISS ARMY" watches is not likely to take place and that respondent's consent to applicant's

use of the mark "SWISS MILITARY" for watches should be given controlling weight.

We concur with the Examining Attorney, however, that the purported consent from respondent is at best nothing more than a mere "naked consent" inasmuch as, besides being a unilateral statement signed on behalf of registrant rather than a bilateral agreement, it is lacking in any detailed provisions as to why confusion is believed not to be likely and does not delineate any action which is to be taken in the event that confusion should occur. Compare In re Mastic Inc., 829 F.2d 1114, 4 USPQ2d 1292, 1295 (Fed. Cir. 1987) with In re Four Seasons Hotels Ltd., supra at 26 USPQ2d 1073.

More fundamentally, even if such consent were to be regarded as being premised upon consideration of marketplace realities and thus as being reflective of more than simply an arrangement or understanding between applicant and registrant in avoidance of the necessity for a license, it must be remembered that the issue of likelihood of confusion is determined on the basis of the goods (and/or services) as identified in the respective application and cited registration, regardless of what the record may reveal as to the particular nature of those goods (and/or services), their actual channels of trade, or the class of purchasers to which they are in fact directed and sold. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). In particular, it

is well settled that, absent any specific limitations or restrictions in the identifications of goods (and/or services) as listed in the applicant's application and the registrant's registration, the issue of likelihood of confusion must be determined in light of consideration of all normal and usual channels of trade and methods of distribution for the respective goods (and/or services). See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Here, both applicant's goods and those of registrant are identified, without limitation or restriction, as "watches," an identification which plainly encompasses all types of watches, including military watches sold at a wide range of price points, and all normal and usual trade channels and distribution methods for watches. We must, accordingly, base our approach to the issue of whether there is a likelihood of confusion on consideration of the entire market for watches and, as stated in Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, supra at 1 USPQ2d 1816, such "is precisely the approach" which is required and "nothing in *du Pont* ... is inconsistent with it."

In this case, the asserted consent by registrant, as the owner of the "SWISS ARMY" mark for "watches," to applicant's unfettered use of the "SWISS MILITARY" mark for "watches" is vitiated by the admission, in applicant's reply brief, that in reality applicant and registrant "market their products at

different prices and through different trade channels." For example, as confirmed in the article from the trade publication American Time:

Since it couldn't use "Swiss Army" on its watches, Precise opted for "Wegner Swiss Military." It put the Wegner line where Forschner wasn't, in mass market outlets. In 1993 Precise had its first watch hit with "Standard Issue," a \$100 watch which remains its top-selling piece.

Thus, notwithstanding that, since 1989, applicant has experienced appreciable sales of its goods and has expended considerable sums on their advertisement and promotion, its lack of awareness of any instances of actual confusion is explained by the fact that its watches and those of registrant do not truly overlap in the marketplace, rather than by the claim that the respective marks, although used on identical goods, are not confusingly similar.

Finally, applicant insists that confusion is not likely because purchasers of watches are sophisticated and careful consumers, citing *In re Leonard S.A.*, 2 USPQ2d 1800, 1802 (TTAB 1987), in which the Board observed that "watches ... are items that are generally not impulse type products but, rather, constitute goods that may be said to be purchased by relatively sophisticated[,] discriminating purchasers who ... can be expected to exercise some care in purchasing these goods." Watches, however, are obviously products which cover an exceedingly wide spectrum of prices, ranging from relatively inexpensive models which would be found in mass market outlets to very high priced timepieces sold in fine jewelry stores. Consequently, customers for watches would include consumers of

all kinds, including ordinary purchasers as well as those who, as the cost of the contemplated purchase becomes more expensive, would be expected to be more prudent and sophisticated in their buying decisions. Nevertheless, even assuming that the purchase of a watch typically involves the exercise by consumers of a significant level of care and deliberation, suffice it to say that such discrimination "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship.

Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). Thus, even sophisticated and careful shoppers, who are familiar or acquainted with registrant's "SWISS ARMY" mark for watches, would be likely to believe, upon encountering applicant's substantially similar "SWISS MILITARY" mark for watches, that such legally identical goods emanate from, or are sponsored by or affiliated with, the same source.

Decision: The refusals under Sections 2(a) and 2(d) are affirmed.

G. D. Hohein

B. A. Chapman

G. F. Rogers
Administrative Trademark Judges,

Ser. No. 74/461,397

Trademark Trial and Appeal Board